

ESTATE OF STELLA RED STAR/SWIFT BIRD

IBIA 88-6

Decided May 17, 1988

Appeal from an order after remand issued by Administrative Law Judge Elmer T. Nitzschke in Indian Probate No. IP RC 223Z 86, IP RC 141Z 85, IP RC 103Z 84.

Affirmed.

1. Indian Probate: Wills: Revocation

A testator will be held to have revoked her will when she physically destroyed the document and signed a statement stating her intention to revoke it, if she is also found to have had testamentary capacity at the time of revocation.

APPEARANCES: Peter Swift Bird, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

In a decision dated June 26, 1986, Estate of Stella Red Star/Swift Bird, 14 IBIA 140, 1/ the Board of Indian Appeals vacated an April 11, 1985, order determining heirs issued in this estate by Administrative Law Judge Elmer T. Nitzschke, and remanded the case for further proceedings. In his April 11, 1985, order, Judge Nitzschke had determined that Stella Red Star/Swift Bird (decedent) died intestate, having revoked her will by physical act and by signing a written document stating her intention to revoke it. He found that, on November 2, 1983, the date of revocation, decedent was competent to revoke her will.

Upon remand, Judge Nitzschke held a hearing at Pine Ridge, South Dakota. In his order after remand, issued on October 28, 1987, he confirmed his April 22, 1985, order determining heirs. He stated that the Board had ordered him to address the following issues:

- (1) On what date did decedent fall from her hospital bed during her hospitalization prior to death.
- (2) Mental capacity of decedent on the day she revoked her will.

1/ The background of this case is discussed in the Board's earlier opinion.

(3) Did the decedent understand and intend the consequences of destruction of her will.

(4) Was the will of the decedent actually destroyed physically or did the written statement of revocation constitute the act of revocation.

(5) If the decedent's will was in fact revoked was a previous will revived.

(October 28, 1987, order at 1.) He made findings of fact as to the five issues as follows:

(1) Decedent fell from her bed on October 30, 1983.

(2) Medical records and the testimony of the nurse on duty support the conclusions that, on November 2, 1983, decedent was aware of the fact that she was dying, was capable of making decisions, and did so in revoking her will.

(3) Decedent stated to the Bureau of Indian Affairs (BIA) probate personnel who visited her that she wanted to destroy or revoke her will. The will was read to her before she revoked it.

(4) Decedent physically destroyed her will with the assistance of a BIA employee. Although the statement of revocation and the signatures upon it are variously written in black ink, blue ink, and pencil, they were all written at the time the will was revoked.

(5) In revoking her last will, decedent did not intend to revive an earlier will, which provided essentially the same testamentary scheme as did the will she revoked.

[1] Judge Nitzschke therefore confirmed his April 11, 1985, order determining heirs in which he had found that, on November 2, 1983, decedent was competent to revoke her will and did so by physical act and by signing a written document stating her intention to revoke the will.

Appellant's notice of appeal from Judge Nitzschke's order after remand was received by the Board on November 16, 1987. Only appellant made filings on appeal.

The Board has carefully reviewed the record on remand and finds that Judge Nitzschke's conclusions are fully in accord with the testimony and documentary evidence.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Nitzschke's October 28, 1987, order after remand is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge